United States Court of Appeals

for the Second Circuit

RESPONSES TO PETITION FOR REHEARING

74-1062

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA and MORTIMER TODEL, as Receiver of the funds, assets and property of Roosevelt Capital Corporation,	:	
Plaintiffs-Appellees,	:	Docket Nos. 74-1062
-against-	:	74-1816
FRANKLIN NATIONAL BANK,	:	
Defendant-Appellant.	:	

DEFENDANT-APPELLANT'S ANSWER TO PLAINTIFFS-APPELLEES' PETITION FOR REHEARING

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER
425 PARK AVENUE
NEW YORK, N. Y. 10022
PLAZA 9-8400

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA and MORTIMER TODEL, as Receiver of the funds, assets and property of Roosevelt Capital Corporation, Plaintiffs-Appellees, -against- FRANKLIN NATIONAL BANK, Defendant-Appellant.	Docket Nos. 74-1062 74-1816

DEFENDANT-APPELLANT'S ANSWER TO PLAINTIFFS-APPELLEES' PETITION FOR REHEARING

This memorandum, which is being submitted pursuant to this Court's order of March 17, 1975, is in response to the petition by plaintiffs-appellees for a rehearing of the above appeal. We would like to take this opportunity to point out to the Court what we believe to be basic errors in the aforesaid petition.

1. The petition suggests that a remand to the court below is "neither appropriate nor necessary" because the dismissal and substitution of parties are matters frequently dealt with by the appellate courts

without remand, citing Rules 42 and 43 of the Federal Rules of Appellate Procedure. The fact is, however, that neither of these Federal Rules is even remotely apposite.

First, the dismissal being sought to create federal jurisdiction over this case is not voluntary dismissal of the entire appeal -- the action contemplated by Rule 42 -- nor even the dismissal of the Receiver as a party to this action. As this Court held in its Opinion of February 24, 1975, since a Receiver has been appointed, the United States is simply not a proper party plaintiff in this action. Thus, the only dismissal which could possibly aid plaintiffs here would be a dismissal of the entire Receivership, and this type of sweeping relief is clearly beyond the scope of Rule 42 and, for that matter, far beyond the usual scope of relief granted by an appellate court.

Second, plaintiffs suggest that the substitution of a new Receiver for plaintiff Todel can be accomplished under Rule 43 of the Federal Rules of Appellate Procedure without remand to the court below. It is clear from a reading of Rule 43, however, that its applicability is limited by its terms to substitutions which are matters of mere formality, such as, a personal representative for a decedent or for a public officer by his successor in office. Even the more general language of Rule 43(b)

is obviously designed to cover formal substitutions necessitated during a litigation such as the incompetency of a party, the dissolution of a corporate party, or the transfer of the beneficial interest in the litigation. See, e.g., Rule 25, Federal Rules of Civil Procedure. The relief requested by the plaintiffs, namely, substitution of a new Receiver for plaintiff Todel, is substantially more than a mere formality. Indeed, the appointment of a Receiver is specifically delegated by statute to the discretion of a District Court which is to consider all of the facts and circumstances. See 15 U.S.C. § 687c(c).

2. Plaintiffs also suggest that this Court might remand the case to the District Court (Eastern District) for the latter to consider the substitution or dismissal of the Receiver (appointed in the Southern District) while this Court retains jurisdiction over the appeal, citing United States v. Valot, 473 F.2d 667 (2d Cir. 1973) and Beck v. Federal Land Bank of Houston, 146 F.2d 623 (8th Cir. 1945). Both Valot and Beck involved situations in which the lower court had considered issues raised by the parties and ruled upon them, but failed to set forth specific findings of fact or the basis for its decision. Thus, in order to permit the appellate court to intelligently review the lower court's

decisions, each case was remanded for the limited purpose of enabling the District Court to amplify the basis for its prior ruling. Here, plaintiffs are asking that this Court retain jurisdiction of their appeal while the District Court (and perhaps the totally different District Court that appointed the Receiver) considers new issues never before presented to it. This, we submit, is hardly the kind of "limited remand" contemplated by the Valot and Beck rulings.

3. Finally, we are constrained to point out that the entire tone of plaintiffs' petition indicates what we believe to be a basic misconstruction of this Court's opinion. The thrust of the opinion was that the District Court lacked jurisdiction and that the complaint be dismissed. The Court went on to note plaintiffs' suggestion, upon which the Court explicitly expressed no view, that it might be possible to cure the jurisdictional defect by dismissing or substituting for the Receiver and, accordingly, the Court remanded "for further action consistent with our opinion." Indeed, the Court appropriately noted that even if the lower court dismisses the action, the plaintiffs "are not without remedy in the state courts." (Footnote 12). Plaintiffs have now turned the entire opinion upside down. They seem to be elevating this Court's limited recognition of their

suggestion into a full-blown decision by the Court to allow the changes requested and, then, they go one step further and set forth the proposition that a remand is either unnecessary, or, even if ordered, its outcome is so clear that the Court should retain jurisdiction over the appeal in the interim.

Respectfully submitted,

KAYE, SCHOLER, FIERMAN, HAYS
& HANDLER
Attorneys for Defendant-Appellant
Franklin National Bank

Julius Berman,
Of Counsel.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA and MORTIMER TODEL, as Receiver of the funds, assets and property of Roosevelt Capital Corporation, Plaintiff-Appellees, -against- FRANKLIN NATIONAL BANK, Defendant-Appellant.	Docket Nos. 74-1062 17-1816 AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

JOSEPH O'BRIEN, being duly sworn, deposes and says that he is employed by the law firm of Kaye, Scholer, Fierman, Hays & Handler, is over the age of twenty-one years and not a party to this action.

1. On the 1st day of April, 1975, deponent served true copies of Defendant-Appellant's Answer to Plaintiffs-Appellees' Petition for Rehearing, annexed hereto, by depositing same, enclosed in a sealed postpaid wrapper in the post office box regularly maintained by the U.S. Postal Service at 425 Park Avenue, New York, New York, addressed to the following attorneys:

David G. Trager, U. S. Attorney
Eastern District of New York
225 Cadman Plaza East
Brooklyn, N.Y. 11201
Attn.: Henry A. Brachtl
Asst. U.S. Attorney

Mortimer Todel, Esq.
1 Rockefeller Plaza
New York, N.Y. 10020

these being the addresses designated by said attorneys for that purpose upon the preceding papers in this action.

Joseph O'Brien
Joseph O'Brien

Sworn to before me this
1st day of April, 1975

Robert Thatcher
Notary Public

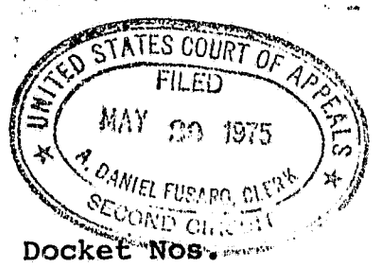
ROBERT THATCHER
Notary Public, State of New York
No. 31[illegible]25
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 197[illegible]

74-1062 original

74-1816

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT



UNITED STATES OF AMERICA and MORTIMER TODEL, as Receiver of the funds, assets and property of Roosevelt Capital Corporation, Plaintiffs-Appellees, -against- FRANKLIN NATIONAL BANK, Defendant-Appellant.	Docket Nos. 74-1062 74-1816

B

P/S

DEFENDANT-APPELLANT'S ANSWER
TO PLAINTIFFS-APPELLEES'
SECOND PETITION FOR REHEARING

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER
425 PARK AVENUE
NEW YORK, N. Y. 10022
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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA and MORTIMER TODEL, as Receiver of the funds, assets and property of Roosevelt Capital Corporation, Plaintiffs-Appellees, -against- FRANKLIN NATIONAL BANK, Defendant-Appellant.	Docket Nos. 74-1062 74-1816

DEFENDANT-APPELLANT'S ANSWER
TO PLAINTIFFS-APPELLEES'
SECOND PETITION FOR REHEARING

This memorandum is being submitted in response to the second petition by plaintiffs-appellees for a rehearing of the above appeal.

From the time this Court ruled on February 24, 1975 that the lower court had no jurisdiction over the subject matter of this litigation and thereafter denied on April 15, 1975 plaintiffs' motion for rehearing, there has been one -- and only one -- change of circumstance in this proceeding. And that is, that as of April 18, 1975, Mortimer Todel's Receivership insofar as it relates to the claims of Roosevelt Capital Corporation ("Roosevelt Capital") against Franklin National Bank ("Franklin") has been terminated. Thus, as of the date of such termination

the United States might theoretically be allowed to prosecute a lawsuit against Franklin on its claim as judgment creditor of Roosevelt Capital. This change, however, has no bearing whatever upon the prior rulings of this Court and can obviously not confer jurisdiction upon the lower court ex post facto. Accordingly, the second petition for rehearing should also be denied.

1. Plaintiff United States is apparently contending (Brief, page 3) that the bar to its suit against Franklin should be viewed as non-jurisdictional and curable retroactively by the dismissal of the receiver, much like the replacement of an original plaintiff (the Receiver) with a substituted or real party in interest (the United States). This analogy is wholly inappropriate for a series of independently sufficient reasons.

First, the substitution of a real party in interest is obviously predicated upon the assumption that the real party could have brought suit himself when the action was first filed. That plainly is not the case here. As this Court explicitly held in its decision, at the time this action was brought only the Receiver had the right to sue Franklin on the claim contained in the complaint. In fact, the Receiver was the only real

party in interest and the United States had no cause of action.

Interestingly, the United States did not become a judgment creditor of Roosevelt until August 3, 1966, almost a year and a half after the Receiver was appointed by the Southern District Court and acquired any claim Roosevelt Capital might have had against Franklin. Thus, not only could the United States not sue Franklin at the time the instant suit was commenced, but there was, in fact, no period during which the United States possessed an actionable claim against Franklin.

Second, the substitution of a real party in interest necessarily assumes that the Court originally had jurisdiction over the subject matter of the claim of the named plaintiff as well as the real party. 3B Moore, Federal Practice § 25.05. Here, per contra, this Court has already held that the lower court lacked subject matter jurisdiction over the Receiver's claim; consequently, replacement of the Receiver by the United States cannot confer jurisdiction retroactively.

Even if the second petition is to be construed as a request by the United States to be substituted for the Receiver pursuant to Rule 43 of the Federal Rules of Appellate Procedure -- a claim nowhere made in the Petition -- this would not avail the plaintiffs.

Substitution is only possible if the District Court had subject matter jurisdiction of the action at the time the suit was commenced. See, e.g., Ransom v. Brennan, 437 F.2d 513 (5th Cir. 1971).* Since this Court has already ruled to the contrary in this matter, such a belated substitution cannot possibly save the day for the plaintiffs.

Nor can the United States derive any comfort from the halfhearted suggestion it makes (Brief, page 6) that the termination of the Receiver's duties vis-a-vis the claim against Franklin may relate back as if the Receiver never had a right to the claim, citing Rosenblum v. Dingfelder, 111 F.2d 406 (2d Cir. 1940) and Brown v. O'Keefe, 300 U.S. 598 (1937). Both cases do not even intimate the slightest support for such a novel contention. Brown and Rosenblum involve bankruptices in which the respective trustees had the option of refusing to take title to burdensome assets. The Supreme Court in Brown analogized the situation to a gift where "Acceptance

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* For example, in cases predicated upon diversity jurisdiction, it has repeatedly been held that it is citizenship at the time a suit is commenced that is determinative and lack of initial diversity cannot be cured by the subsequent change in domicile of a party. See, e.g., Lyons v. Weltmer, 174 F.2d 473 (4th Cir.), cert. denied, 338 U.S. 850 (1949); Robertson v. Limestone Manufacturing Company, 20 F.R.D. 365 (W.D. So. Carolina 1957).

is presumed, but rejection leaves the title by relation as if the gift had not been made." 300 U.S. at 602, and the court in Rosenblum explained the "relation back" concept as simply "a convenient way of describing a situation where the trustee never had occasion to proceed . . ." 111 F.2d at 409 (emphasis added). Where, as here, the Receiver has vigorously prosecuted the claim for over six years, it strains credulity to even suggest that the termination of his duties as to this aspect of his appointment somehow reflects upon whether he ever took title to the claim under his original appointment.

2. Even if it were assumed--contrary to the law--that despite the lack of subject matter jurisdiction over the Receiver, a substitution of the United States as plaintiff in this action were appropriate because it is the real party in interest or because the dismissal of the Receiver now permits it to bring suit, the United States has been unable to indicate any procedure by which this result could be obtained. As the United States itself recognizes (Petition, page 7), Rule 17(a) of the Federal Rules of Civil Procedure is wholly inapplicable to appellate courts. Rule 43 of the Federal Rules of Appellate Procedure, dealing with the substitution of parties, is, like Rule 25 of the Federal Rules of Civil Procedure, limited to formal substitutions necessitated by events such as the death, incompetency or dissolution of a party.* Here, the United States has not been appointed Receiver in place of Todel; quite the contrary, the Receivership is continuing unchanged with respect to all matters other than Roosevelt Capital's claim against Franklin.

Needless to say, the contention of the United States that its substitution for the receiver is somehow made simpler because it is listed as plaintiff in the caption of this proceeding is patently wrong. As this Court held in

*We note that nowhere in its papers on this motion does the United States cite this rule or any other of the Federal Rules of Appellate Procedure.

its opinion, the United States had no actionable claim against Franklin during the pendency of this action. Franklin moved in the District Court to have the United States dismissed as a party and that motion should have been granted. If the United States were now seeking for the first time to become a party, we submit that the Court would give short shrift to such a contention. The position of the United States should not--and cannot--be improved because it improperly joined in the commencement of the suit in the first place.

3. The United States has assumed in its papers on this petition that the termination of the Receivership with respect to Roosevelt Capital's claim against Franklin is effective even though only partial and removes the jurisdictional defect found by this Court. To support this proposition, the petition in the Southern District for partial dismissal of the Receiver relies on two cases, neither of which furnish any support to petitioner.

First, although a Receiver may be dismissed as to a portion of the Receivership assets, that dismissal relates to assets with respect to which the Receivership is no longer necessary. As stated by the court in Jennings v. Fidelity and Columbia Trust Company, 240 Ky. 24, 41 S.W.2d 537 (1531), cited by the United States: "It [the Receivership] may be concluded in part and continued as to any unsettled subject of the receivership." (emphasis added).

Similarly, in Chase Nat. Bank v. Wabash Ry. Co., 52 F. Supp. 359 (E.D. Mo. 1943), also cited by the United States, the Receivers had essentially completed their functions and the Court dismissed the Receivership as to all matters except those which the Receivers might later be called upon to do. Here, the exact opposite is the case. The very matter as to which the Receivership was terminated--the claim against Franklin--is the principal asset of Roosevelt Capital. In such circumstances, the dismissal of the Receiver as to the claim against Franklin should not be sustained.

Moreover, there is absolutely no rhyme or reason for terminating a portion of the Receivership and keeping it for other assets. For example, why should the Receiver be suing the selling and purchasing stockholders in the Southern District case and the United States be allowed to sue Franklin in the Eastern District court in connection with the same transaction which is the subject matter of the Southern District litigation? The complications that can arise from such machinations are manifold. Will recovery in one suit bar recovery in the other although different plaintiffs are involved? Who is the real party in interest in both suits? The attempt by petitioner to evade the strictures of this Court's decision, if anything, underscores the need for either a full Receivership or complete termination. Half-way steps, as engaged in by petitioner, are the breeding-ground for procedural and substantive havoc and should not be countenanced.

CONCLUSION

Plaintiff United States in its lengthy papers submitted on this Petition fails to suggest a single viable theory for the relief requested by it.. Candidly put, what the United States asks is that this Court set aside cardinal principles of Federal jurisdiction and procedure to reach the result sought by the United States. This, we submit, a Court should not--indeed may not--do. Accordingly, the petition for rehearing should be denied.

Respectfully submitted,

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER

Attorney for Defendant - Appellant
Franklin National Bank

Julius Berman
Of Counsel

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA and MORTIMER TODEL, as Receiver of the funds, assets and property of Roosevelt Capital Corporation,	Docket Nos. 74-1062 17-1816
Plaintiff-Appellees,	AFFIDAVIT OF SERVICE
-against-	
FRANKLIN NATIONAL BANK,	
Defendant-Appellant.	

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

JOSEPH O'BRIEN, being duly sworn, deposes and says that he is employed by the law firm of Kaye, Scholer, Fierman, Hays & Handler, is over the age of twenty-one years and not a party to this action.

1. On the 20th day of May, 1975, deponent served true copies of Defendant-Appellant's Answer to Plaintiff-Appellees" Second Petition for Rehearing, annexed hereto, by depositing same, enclosed in sealed postpaid wrappers in the post office box regularly maintained by the U.S. Postal Service at 425 Park Avenue, New York, New York, addressed to the following attorneys:

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Eastern District of New York
225 Cadman Plaza East
Brooklyn, N.Y. 11201
Attn.: Henry A. Brachtl
Asst. U.S. Attorney

Mortimer Todel, Esq.
1 Rockefeller Plaza
New Yrok, N.Y. 10020

these being the addresses desingated by said attorneys for that purpose upon the preceding papers in this action.

Joseph O'Brien

Sworn to before me this
20th day of May, 1975

Robert Thatcher
Notary Public

ROBERT THATCHER
Notary Public, State of New York
No. 31-0325
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1976

74-1062-1816

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

- X

UNITED STATES OF AMERICA and
MORTIMER TODEL, as Receiver of
the funds, assets and property
of Roosevelt Capital Corporation,

Plaintiffs-Appellees,

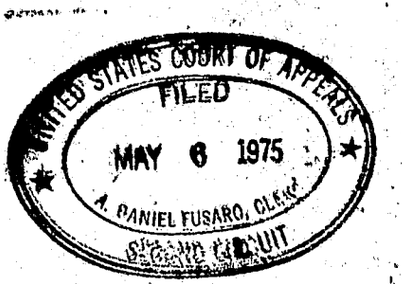
- against -

FRANKLIN NATIONAL BANK,

Defendant-Appellant.

- X

Docket Nos.
74-1062
74-1816



BRIEF OF PLAINTIFF-APPELLEE UNITED STATES OF AMERICA
IN SUPPORT OF PETITION FOR REHEARING

DAVID G. TRAGER
United States Attorney
Eastern District of New York
Attorney for Plaintiff-Appellee
UNITED STATES OF AMERICA
225 Cadman Plaza East
Brooklyn, New York 11201

HENRY A. BRACHTL
Assistant U. S. Attorney

Of Counsel

UNITED STATES COURT OF APPEALS
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Defendant-Appellant.	:	

BRIEF OF PLAINTIFF-APPELLEE UNITED STATES OF AMERICA
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DAVID G. TRAGER
United States Attorney
Eastern District of New York
Attorney for Plaintiff-Appellee
UNITED STATES OF AMERICA

HENRY A. BRACHTL
Assistant U. S. Attorney
Of Counsel

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PRELIMINARY STATEMENT

This brief is submitted in support of the second Petition for Rehearing of plaintiff-appellee UNITED STATES OF AMERICA and to amplify certain points or aspects of the second Petition.

A R G U M E N T

I

THE CLAIM OF THE UNITED STATES SUFFERS NO JURISDICTIONAL DEFECT

The second Petition for Rehearing posits that the equity housekeeping doctrine which impedes a creditor's ability to sue where a receiver exists does not oust the subject matter jurisdiction conferred on the federal courts by Congress in 28 U.S.C. §1345.*

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* The Petition states that "[this] Court did not find, nor was there, a jurisdictional defect in the claim of the United States, of which the district court had jurisdiction under 28 U.S.C. §1345." Second Petition for Rehearing, p.1, n.1.

No case or treatise we have examined treating the receiver-creditor relationship suggests that the impediment to the creditor is other than the equity housekeeping doctrine discussed in the Petition. However, cases and rules treating other, somewhat analagous types of party defects confirm that such defects may require repair, even on threat of dismissal, but may often be waived, and in no event oust jurisdiction otherwise properly laid.

Thus, the defense that an action is conducted by one other than the real party in interest "is not jurisdictional, but is, indeed, freely waivable by the parties through failure to make claim therefore." Fox v. McGrath, 152 F.2d 616, 618 (2d Cir. 1945), cert. den., 327 U.S. 806 (1945).

That such a defect is waivable is but a corollary to the proposition that the defect is not jurisdictional, for it is axiomatic that the parties to a suit cannot confer jurisdiction on the federal courts, where none exists, even by waiver or by stipulation. See Rule 12(h)(3), Federal Rules of Civil Procedure.

So, similarly, a plaintiff's lack of capacity to sue is waivable, as, for example, when not specifically raised by pleading, Rule 9(a), Federal Rules of Civil Procedure, Trounstine v. Bauer, Pogue & Co., 144 F.2d 379, 383 (2d Cir. 1944), cert. den. 323 U.S. 777 (1944), and cannot be

jurisdictional.

Misjoinder of parties plaintiff likewise cannot be a jurisdictional defect, for it is explicitly "not ground for dismissal" under Rule 21, Federal Rules of Civil Procedure.

Even non-joinder of "indispensable" parties is not a jurisdictional defect, the determination of whether to proceed being instead a matter for resolution within the discretion of the court. Rule 19, Federal Rules of Civil Procedure; Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 122 (1968).

The current federal rules regarding real parties in interest and joinder of parties are progeny of Federal Equity Rules: Rule 37, Parties Generally (action to be prosecuted in name of real party in interest); Rule 39, Absence of Persons Who Would Be Proper Parties; and Rules 43 and 44, Defect of Parties. The kinship in equity of these rules and the doctrine against suits by creditors when a receiver exists serves to underscore the function of these rules, not as imprisoning procedural niceties, but as aids to doing equity and justice.

In sum, the party defect or impairment afflicting the UNITED STATES as plaintiff-appellee in this action, like other more common party defects, does not oust federal subject matter jurisdiction otherwise properly laid.

II

THE RECEIVER DOES NOT PETITION FOR REHEARING

The Receiver of Roosevelt Capital Corporation, as plaintiff-appellee, does not petition the Court for rehearing and did not join in the motion of the UNITED STATES for leave to petition anew, contrary to the recited premise of this Court's Order granting leave to file the second Petition for Rehearing (i.e., "Plaintiffs-Appellees having sought leave . . .", Order, April 22, 1975).

For the Receiver to have done so would have been, it seems, inconsistent with the Receiver's relinquishment of any claims of Roosevelt or its sole creditor against Franklin National Bank - relinquishment occasioned by the termination of the receivership insofar as it encompasses such claims, and the discharge of the receiver with respect to such claims.

This point, we submit, underscores the efficacy of the plaintiffs'-appellees' cure of the defect found by this Court in the ability of the UNITED STATES to prosecute as creditor both derivative claims of Roosevelt and non-derivative claims in this action. The theoretical competition of the Receiver and the UNITED STATES as sole creditor has ceased.

Moreover - although the point is not essential to the Petition or the cure - the relinquishment or abandonment by the receivership of claims against Franklin may relate back, as in bankruptcy cases, so that the receiver may "be treated as having never had title to [the claims] . . . ." Rosenblum v. Dingfelder, 111 F.2d 406, 409 (2d Cir. 1940), citing Brown v. O'Keefe, 300 U.S. 598, 602 (1937).

In sum, the Receiver is no longer an impediment to the recovery by the UNITED STATES or, on this Petition, even a participant.

III

NO FURTHER REMEDIAL ACTION IS NECESSARY FOR FINAL ADJUDICATION ON THE MERITS

It should be noted that, contrary to suppositions articulated in the earlier Petition for Rehearing in this case that this Court might be called upon to substitute or drop a party to reflect a cure of the defect, such steps have been obviated by the cure effected, viz., the termination of the receivership as to any claims against Franklin National Bank.

It may, however, be appropriate following this rehearing - and it is within this Court's power, 28 U.S.C. §2106 - to modify the judgment insofar as it favors the Receiver, both for want of jurisdiction and, now, mootness, while affirming the judgment in this case insofar as it favors the UNITED STATES for "such amount as shall satisfy the judgment of the UNITED STATES against Roosevelt Capital Corporation with interest and costs . . . ." Judgment, Joint Appendix, p. 607.

IV

THE PETITION RESTS UPON AND INCORPORATES PRIOR SUBMISSIONS ON THIS APPEAL

The Petition for Rehearing rests upon and incorporates (1) the Brief for Plaintiffs-Appellees, submitted in advance of oral argument, treating the merits of the case; (2) the earlier Petition for Rehearing of plaintiffs-appellees submitted following this Court's decision of February 25, 1975, treating the possible prejudice to plaintiffs-appellees attendant upon a remand; (3) the affidavit of Henry A. Brachtl and exhibit submitted in support of the motion of plaintiff-appellee UNITED STATES for stay of the mandate and leave to file a second petition for rehearing; and (4) the record and all prior proceedings on this appeal.

V

ORAL ARGUMENT ON THE PETITION FOR REHEARING AND ON THE MERITS IS RESPECTFULLY REQUESTED.

"It was not until oral argument before [this Court], when Judge Friendly raised the question in open court, that the parties focused on the jurisdictional issue." Decision of this Court herein, February 25, 1975, p. 1895. Counsel were thus ill-prepared to address that issue on oral argument, and very little was said or heard thereafter of the merits.

This Court is among the last, if not the last, of the federal Courts of Appeals to treat oral argument as the rule, not the exception. That it does so attests the value of argument to judicial decision making as perceived by this Court.

We respectfully submit that in this case, where argument on the merits was early aborted and where points on the Petition for Rehearing may generate questions counsel could not anticipate - like the jurisdictional issue - oral argument is appropriate and useful, and we pray that the Court will hear counsel.

CONCLUSION

For the reasons set forth in the accompanying second Petition for Rehearing, the UNITED STATES prays that this Court will now determine this appeal on the merits and, for the reasons set forth in the Brief for Plaintiffs-Appellees addressed to the merits, the UNITED STATES prays that the decision and order of the District Court granting summary judgment to the UNITED STATES be affirmed.

Respectfully submitted,

DAVID G. TRAGER
United States Attorney
Eastern District of New York
Attorney for Plaintiff-Appellee
UNITED STATES OF AMERICA

HENRY A. BRACHTL
Assistant U.S. Attorney
Of Counsel

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

Geraldine Pogoda, being duly sworn, says that on the 6th day of May 1975, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a Brief In Support of Petition For Rehearing of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Mortimer Todel, Esq.
1 Rockefeller Plaza
New York, N.Y. 10020

Kaye, Scholer, Fierman, Hays & Handler, Esqs.
425 Park Ave.
New York, N.Y. 10022 Att: Julius Berman, Esq.

Sworn to before me this
6th day of May 1975

Evelyn Sommer

EVELYN SOMMER
Notary Public, State of New York
No. 24-4502158
Qualified in Kings County
Commission Expires March 30, 1977

Geraldine Pogoda

TAKE NOTICE that the within
nted for settlement and signa-
Clerk of the United States Dis-
n his office at the U. S. Court-
Cadman Plaza East, Brooklyn,
the ____ day of _____,
:30 o'clock in the forenoon.

lyn, New York,
_____, 19____

_____
d States Attorney,
ney for _____

_____
_____
_____
or _____

AKE NOTICE that the within
of _____duly entered
____ day of _____
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rict Court for the Eastern Dis-
York,
yn, New York,
_____, 19____
_____
States Attorney,
ey for _____

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r _____

_____ Action No._____

UNITED STATES DISTRICT COURT
Eastern District of New York

—Against—

_____

United States Attorney,
Attorney for _____
Office and P. O. Address,
U. S. Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Due service of a copy of the within _____
_____is hereby admitted.
Dated: _____, 19____

_____
Attorney for _____

FPI-LC-5M-8-73-7355